UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 20, SUBREGION 37

KAUAI VETERANS EXPRESS CO.

and

OPERATING ENGINEERS LOCAL UNION NO. 3.

Case Nos. 20-CA-193339
20-CA-203829
20-CA-204839
20-CA-209177

CHARGING PARTY'S BRIEF IN SUPPORT OF THE HONORABLE DICKIE MONTEMAYOR'S DECISION AND ANSWERING BRIEF OPPOSING RESPONDENT'S EXCEPTIONS

Gening Liao, Esq. (SBN: 248075)
OPERATING ENGINEERS LOCAL UNION NO. 3.
1620 South Loop Road
Alameda, California 94502
Telephone: (510) 748-7400
Facsimile: (510) 748-7436
Email: gliao@oe3.org

Attorney for Charging Party
Operating Engineers Local Union No. 3

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

I. INTRODUCTION

Respondent Kauai Veterans Express Co. ("Respondent" or "KVE") has engaged in continued efforts to interfere with the free will of truck drivers whom it employs – Charging Party Operating Engineers Local Union No. 3's members – and violate their Section 7 rights. Respondent did this by compounding the following unlawful actions throughout a year-long period: (1) refusing to provide the Union information to which it was entitled as part of a pending grievance; (2) unlawfully facilitating, orchestrating and declaring a withdrawal of recognition from the Union; (3) polling of employees without the legally required safeguards; and (4) unilateral changes in terms of employment without notice to the Union.

Respondent failed to provide information requested by the Union related to a pending grievance. The grievance challenged KVE's termination of three employees based on shortage of work while retaining three non-bargaining unit workers who performed the same covered work. Respondent refused to provide the responsive information despite repeated requests.

In or around September 2016, Respondent created a petition on KVE letterhead, from KVE President Stan Morinaka to all employees, and presented to them at a staff meeting for its truck drivers to sign. A few months later in January 2017, Respondent's Office Manager gave one of the truck drivers direction about how to withdraw from the Union, then assisted with the drafting of the petition KVE ultimately relied on to withdraw recognition. When the Union challenged Respondent's reliance on the petition to support its withdrawal of recognition, KVE, through declarations prepared by its counsel, polled the truck drivers without notice to the Union, without providing the legally required precautions under *Struksnes*, and without doing it in secret. Finally, Respondent ceased making dues deductions and fringe contributions on the truck drivers' behalf in reliance on its unlawful withdrawal of recognition.

On April 27, 2018, the Honorable Administrative Law Judge Dickie Montemayor issued a Recommended Decision and Order finding that Respondent violated Sections 8(a)(1) and (5) of the Act by engaging in the conduct alleged by Charging Party and General Counsel for the NLRB in all counts of the Complaint. On May 25, 2018, Respondent filed exceptions to *all* of Judge Montemayor's legal findings based on the same arguments and a disregard for the facts, which it has pursued since the commencement of these proceedings.[1]

II. STATEMENT OF FACTS

A. SEPTEMBER 6, 2016 TERMINATION GRIEVANCE

Respondent KVE and Charging Party have enjoyed a rich bargaining relationship since February 28, 2002, when it recognized the Union as the exclusive representative of KVE's employees. (Tr. 235; GC Exh. 25) This changed when on September 6, 2016, the Union filed a grievance to challenge Respondent's decision to layoff three bargaining unit employees while retaining non-bargaining unit employees to perform *the same work.* (Tr. 65; GC Exh. 7)

Respondent disputed that the work was covered by the parties' Agreement. The Union promptly requested information from Respondent related to the grievance, to assist with its investigation of which type of work Respondent considered to be "covered" and which work fell outside of that. With that understanding, the Union would also need to review Respondent's records indicating which employees performed which type of work. On December 15, 2016, the Union requested the following specific information:

1. Company records for all hauling, delivering and/or trucking activity for all trucks in Kauai Veterans Express' fleet from January 1, 2016 to the present, including the name and classification of the driver of each truck engaged in any hauling, delivering or trucking activity.

[1] Counsel for the General Counsel filed limited exceptions as well, with which Charging Party agrees.

2. The specific trucking activity performed by Kauai Veterans' Express, if any, that Kauai Veteran's Express is claiming is not covered bargaining unit work.

3. A list of all non-union employees who are engaged in any trucking activity, the employee's classification and the dates and hours of work performed by each such employee.

(GC Exh. 8) This information was necessary in preparation for arbitration of the grievance. KVE provided nothing, instead responding through its attorney Jeffrey Harris on December 26, 2016, in part, "I don't have any more information to give you, the matter is not on my calendar for Jan. 9...," the scheduled arbitration date. (GC Exh. 12) Shortly thereafter Harris sent Kim copies of the parties' collective bargaining agreements since 2003, which related to KVE's argument that freight hauling was not covered work. (GC Exh. 15) The parties continued the hearing.

Respondent failed to provide the responsive information and instead, responded exclusively with information that it believed supported its position that "freight hauling" was not covered work under the parties' current collective bargaining agreement.[2] (GC Exhs. 15 and 16; R. Br. in Support at 2-6) On January 25, 2017, after continued attempts to work with Respondent, Charging Party, through its attorney Sean Kim, sent a letter to Harris, including all outstanding requests, as well as a few additional ones. (GC Exh. 17) All items were related to the outstanding grievance and upcoming arbitration, and necessary for Charging Party to evaluate its position and Respondent's purported defenses. (Tr. 137; GC Exh. 17; CP B. at 7-8) In response, on April 12, 2017, other than resending the same nonresponsive documents Harris had previously sent, Respondent provided nothing further. (Tr. 140; GC Exh. 21)

Respondent's refusal to provide the requested information has forced Charging Party to

[2] This included the copy of an email from Union District Representative Pane Meatoga to KVE Office Manager Susan Taniguchi regarding freight hauling, which Harris sent to Kim on January 12, 2017. (GC Exh. 16) The only other document Harris sent to Kim was a list of drivers and two years of contribution records which was responsive to an earlier information request from September 21, 2016, and unrelated to the outstanding grievance and arbitration. (Tr. 135; GC Exh. 13)

agree to continue the arbitration over the grievance indefinitely, pending litigation of the unfair labor practice charge it was also forced to file on February 17, 2017 over the outstanding information requests. (Tr. 140)

B. INTERFERENCE WITH EMPLOYEE SECTION 7 RIGHTS

On September 1, 2016, *the same day as the layoff* of bargaining unit members that is the subject of the pending grievance and arbitration, Respondent created a petition on company letterhead containing the language "FROM: STAN MORINAKA, SR." – KVE's Chief Executive Officer, and a reference to the "UNION," along with a table with preprinted names of ten KVE bargaining unit drivers. (Tr. 214; GC Exh. 26) Above the table was the language, "PLEASE CHECK IF YOU WOULD LIKE TO BE IN THE UNION," and next to each name was the option to check "YES" or "NO." (GC Exh. 26)

Admittedly it was around this same time, according to Morinaka, that he hired counsel Jeffrey Harris to help him "quit the union." (Tr. 198-9) According to Morinaka, it was his Office Manager Haku Rivera who created the petition and presented it to the drivers at a regular meeting in Morinaka's office. (Tr. 214, 237-38, 242) The details regarding when the drivers were presented with the petition is unclear, but Morinaka handwrote the date "9-6-2016" on the petition, indicating that he received the signed document on that date. (Tr. 214, 237, 239) Shortly thereafter, Morinaka gave the petition to Harris. (Tr. 241)

There is no evidence of what, if anything, became of that document. However according to the Declaration of KVE Office Manager Susan Taniguchi, it was "mid to late September 2016" – *after* the drivers had already reviewed and marked the September 1, 2016 petition from KVE – that the drivers allegedly began to express a desire to leave the Union. (GC Exh. 1(z), Decl. of Susan Taniguchi, ¶ 2) Taniguchi goes on to admit that she provided information to

//

Morinaka on or around January 12, 2017 about the withdrawal of recognition process, based on instructions received by Harris. (GC Exh. 1(z), Decl. of Susan Taniguchi, ¶ 3)

Sometime in the two weeks between then and January 26, 2017, Taniguchi provided instructions to James Kanei, 3rd about how to withdraw from the union, including advising him "on holding a meeting…" with the other drivers. (Tr. 256-57) On January 26, 2017, Kanei convened a meeting with the other drivers after work. (Tr. 251, 257, 261) Kanei took notes and after the meeting, brought that document to Taniguchi. (Tr. 253-254)

Based on Kanei's own testimony, Taniguchi took Kanei's printed document and converted it into the language in the letter and petition.[3] (Tr. 258-59) Specifically, she addressed the document to KVE counsel Jeffrey Harris, created the table with employee names, added the entirety of the language under the petition, and modified Kanei's notes to create the introductory paragraphs. (Tr. 258-59) The final petition and letter mentions only union membership status and nothing about the union as the collective bargaining representative or any desire for the union to no longer represent the drivers. (GC Exh. 1(f)) To the contrary, below the table of signatures it states: "My initial and signature above indicates my desire… to participate as a member of" the Union." (Tr. 259; GC Exh. 1(f))

//

//

//

//

[3]Despite the misleading table set forth in Respondent's Brief in Support of its Exceptions at 9-10, the document Kanei presented to Taniguchi containing notes from the meeting *is not* in the record. What the record includes is the final petition and letter, addressed to Harris *by Taniguchi*, with language drafted *by Taniguchi*, allegedly based on Kanei's notes, and Kanei's testimony. (Tr. 252-54, 256-57)

C. IMPROPER WITHDRAWAL OF RECOGNITION, POLLING AND UNILATERAL CHANGES

On February 1, 2017, Harris emailed then counsel for the Union declaring an anticipatory withdrawal to be effective July 1, 2017, *five months* from the date of the email. (GC Exh. 1(f)) He attached the undated, unsigned letter and petition to Harris with prepopulated employee names and signatures. The Union heard nothing further about any anticipatory or actual withdrawal of recognition from KVE until August 4, 2017, when Respondent filed a Motion for Partial Summary Judgment in the outstanding unfair labor practice charge involving Respondent's refusal to provide information. (GC Exh. 1(f)) The Motion attempted to have the complaint dismissed based on KVE's withdrawal of recognition from the Union. (Tr. 66, 70, 81)

It was only then that KVE confirmed its withdrawal of recognition from the Union effective July 1, 2017. Testimony KVE President Stanley Morinaka revealed that the decision was based on two reasons: (1) the employee petition and letter to Harris, signed by the drivers but drafted by Taniguchi; and (2) the union's unwillingness to help Morinaka find work for KVE. (Tr. 231-32, 246).

The Union promptly filed the underlying charge challenging the unsupported and unlawful withdrawal of recognition. In response to Charging Party's Opposition to Respondent's Motion for Partial Summary Judgment, KVE, through its attorney Christine Belcaid, prepared declarations for KVE employees Kanei, Palani Correa, Russell Fernandes, Alan Jeffries, Eric Medeiros, and Rysan Sakamoto, all dated either August 17 or 18, 2017, and all almost identical.[4] (GC Exh. 1(m)) The respective declarations for *all* drivers, prepared by Belcaid based on a conversation with just *one* driver – Kanei – all contained the identical statements: "I no longer

[4] One final declaration was submitted for Carlito Pigao, dated September 8, 2017, also containing the same identical statement and also without any direct correspondence with Belcaid. (Tr. 160)

wished to be represented by the Union, when I signed the petition, and I no longer wish to be represented by the Union today." (Tr, 159; GC Exh. 1(m))

Belcaid *did not* notify the Union prior to speaking with Kanei to prepare his declaration, and she was not involved in the presentation of the declarations to the other drivers. (Tr. 159, 166) Indeed, the Union was never informed by anyone at KVE that the company intended to ask employees about their union sentiment. (Tr. 84) Belcaid ultimately received all of the signed declarations from KVE Office Manager Susan Taniguchi. (Tr. 162, 166)

Respondent admits that it began to cease deduction of employee dues in July 2017, and then continued with additional employees in September 2017, despite the requirement to make such deductions and remit them to the Union under Section 23 of the parties' Agreement. (R. Br. in Support at 14; GC Exhs. 4 and 5) Respondent further admits that it made its last trust fund contributions in July 2017, covering the period ending June 30, 2017, also in contravention of its obligations under the Agreement to make hourly contributions to the Union's pension annuity trust fund. (Tr. 70; R. Br. in Support at 14-15; GC Exh. 4 and 5)

The Union became aware of the cessation of trust fund contributions in August 2017 through delinquency reports, which report information based on a one-month delay. (Tr. 72-73, 115) KVE changed its dues deductions and trust fund contributions practices without any prior notice to the Union or an opportunity for the Union to bargain over them. (Tr. 73)

//

//

//

//

//

III. ARGUMENT

A. THE ALJ PROPERLY MADE FINDINGS OF FACT AND APPLIED THE LAW IN FINDING THAT RESPONDENT'S WITHDRAWAL OF RECOGNITION WAS UNLAWFUL

For all of the reasons set forth below, the Board should adopt the Administrative Law Judge's factual findings and legal conclusion that Respondent's withdrawal of recognition violated Sections 8(a)(1) and (5) of the Act, and reject Respondent's Exceptions 1 through 19.[5]

1. Susan Taniguchi Is Respondent's Agent

Despite a desperate but unsuccessful attempt by Respondent to prove otherwise, it is clear as a matter of law that KVE Office Manager Susan Taniguchi acted as an agent of KVE under Sections 2(2) and (13) of the Act. As explained in the ALJ's decision, the Board applies the test of "apparent authority" to determine whether an employee is an agent of the employer. *Ethorn Enterprises,* 279 NLRB 576 (1986), enfd. 843 F.2d 1507 (2d Cir. 1988). Specifically, the question is whether "under all circumstances, the employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management."

---

[5] Respondent makes a big to-do about the ALJ's alleged failure to provide any detailed credibility determinations. What KVE fails to recognize is that the failure to report credibility determinations is only relevant in the face of disputed testimony. Indeed, in *Don Moe Motors, Inc.*, 237 NLRB 1525 n.1 (1978), cited by Respondent, the Board provides that "when, as here, the Administrative Law Judge fails to state the specific reasons for accepting some testimony *while rejecting other testimony*... it is of no aid to the Board." There is no rejected testimony at issue in this situation, as the ALJ's legal conclusion that Respondent's withdrawal of recognition was based on insufficient evidence is based on the testimony of Respondent's own witnesses and the documentary record. His conclusions arise from three components: (1) the January 2017 letter and petition to Harris; (2) employer taint over the process through Taniguchi's aid of the letter and petition; and (3) the September 2017 petition to employees. Each finding is based on the plain language of the relevant documents, live testimony from KVE witnesses Stan Morinaka and James Kanei, and written testimony from KVE Office Manager Susan Taniguchi. The Judge did not reject any of the applicable witness testimony and the Union offered no contrary testimony, let alone any testimony on which the ALJ relied to reject evidence from KVE. Any lack of reference to credibility determinations does not compromise the ALJ's conclusions.

Id. at 576. A further inquiry is whether under the circumstances, the employee would "reasonably believe that the alleged agent was acting on behalf of management when he took the action in question." *United Scrap Metal Inc.*, 344 NLRB No. 55 (2005), *citing Quality Mechanical Insulation, Inc.,* 340 NLRB No. 91 (2003). In *Ethorn*, the nonsupervisory[6] employee at issue, a clerk, whom the Board determined acted as the employer's agent, acted as a conduit between management and employees. Management relayed information to employees through the clerk, and employees informed the clerk of information they desired to be brought to the employer's attention. *Ethorn Enterprises,* 279 NLRB 576.

Taniguchi acts as a conduit between counsel, management and employees, making her an agent under *Ethorn.* Taniguchi correspondents with counsel directly regarding KVE matters, such as when she asked Harris for advice regarding withdrawal of recognition from the Union in September 2016. Counsel would not communicate with an employee of a client so openly unless that employee was an agent of the employer. Further, Counsel emails her to get in touch with the employees. Indeed, Respondent's counsel Christine Belcaid's own testimony is that she sent Carlito's Pigao's declaration to Taniguchi to get it to him for his signature. (Tr. 161) Taniguchi returned the signed declaration to her that same day. There is no other way to interpret this testimony than that Taniguchi had Pigao sign the declaration. (Tr. 162)

Based on Kanei's testimony, Taniguchi is the one who instructed him about having a meeting with the drivers and coming to an agreement. When Kanei wanted to know how to move

---

[6] Respondent further contends that Taniguchi is not a supervisor under Section 2(11), but this is a distinction without a difference as it has no bearing on her agency status. The ALJ never made such a claim in his decision or relied on any analysis of her supervisor status in concluding that she is an agent. Nonetheless, Respondent's claim is contradicted in the record by testimony from its own witness, KVE President Stan Morinaka, who responded to a question about whether there are "other supervisors," that one is "office manager, Susan Taniguchi." (Tr. 176)

forward, he went to Taniguchi. Finally, it was Morinaka who stated that when "Susan go on vacation (sic), my daughter takes over," implying that when Taniguchi is there, she is in charge. (Tr. 176) Ironically, it is Respondent who repeatedly refers to Taniguchi as an agent throughout its brief, despite concurrently claiming that she is not one. (R. Br. in Support at 26, 28)

Unlike the employee at issue in *Ethorn*, who was a nonsupervisory clerk, the ALJ correctly notes yet another reason Taniguchi is an agent of Respondent. Her title alone – Office Manager – cloaks her in apparent authority. The Board has long held that the "position and duties of the employee alleged to be an agent are relevant in determining agency status." *Harbor Rail Services Co.*, 2017 NLRB LEXIS 211 (2017). Respondent's exception to this finding is confusing as the title alone is not the *only* basis for her legal status as an employer agent. The ALJ cites to numerous other reasons why Taniguchi is an agent of the employer, including her conduct on behalf of the employer as it involved the employees' petition.

2. Respondent's Exceptions Regarding the Petition Process Should be Rejected.

Respondent takes exception to several of the ALJ's findings regarding the petition drafting process. First, KVE incorrectly contends that the ALJ's statement that "Taniguchi spoke with [Mr. Kanei] to advise him on the process of creating a petition and getting it signed" prior to the January 26, 2017 meeting, is erroneous. (R. Br. in Support at 24, *citing* Decision at 5:17-19) As Respondent aptly states, Kanei is the only witness to testimony on this issue. And it is he who clearly testified that Tanaguchi advised him of the withdrawal process prior to the actual meeting. Indeed, Kanei twice stated that it was Tanaguchi who gave him advice about the process of withdrawing and the need to "get the men together," and "come to an agreement." (Tr. 256) Specifically, Tanaguchi "did instruct me on holding a meeting all of that…" (Tr. 257)

Second, Respondent excepts to the ALJ's finding that Taniguchi created the petition, and instead attempts to characterize it as "minor editorial assistance." (R. Br. in Support at 24)

Kanei's own testimony reveals that her assistance was anything but "minor." Taniguchi addressed the letter to "Mr. Jeffrey Harris," modified the language so that it was directed to him, and inserted the prepopulated table with the drivers' names. (Tr. 258; GC Exh. 24) She told Kanei that he would need a signature from each driver to follow their respective names. (Tr. 258) The most critical part of the document – the language of the petition with the statement that explains the meaning of the signatures in the table above – was completely drafted by Taniguchi. To characterize Taniguchi's involvement as "minor" requires a selective reading of Kanei's testimony and a complete disregard for the record, which Respondent clearly does in its Brief. Respondent hopes to direct the Board more to Kanei's involvement in the drafting *process* so as to distract from the fact that the language he drafted made up only one small portion of the letter. For these reasons, the Board should reject Respondent's Exceptions 7 and 8.

3. The ALJ's Application of the Law Regarding Ministerial Assistance Was Proper

Respondent goes to great lengths to attempt and distinguish the Board cases relied on by the ALJ in finding that Taniguchi provided more than the permissible ministerial assistance, but such efforts rely on Respondent's own misapplication of the law or once again, a selective consideration of the facts.

Respondent declares that "editorial suggestions" may be offered *after* an employee drafts a petition without violating the Act, then claims that Kanei prepared the first draft. *Eastern States Optical, Inc.*, 275 NLRB 371, 372-3 (1986). But, it ignores the fact that Taniguchi is the one who actually drafted the language of the petition!

Respondent also acknowledges that it is not proper for an employer to advise an employee about the number of signatures required on a petition under *Narricot Industries*, relied

upon by the ALJ in his decision. *Narricot Indust., L.P.*, 335 NLRB 775 (2009).[7] Respondent then attempts to distinguish the facts from that case by boasting that Taniguchi did not tell Kanei how many signatures he needed. It completely ignores Kanei's testimony, however, that Taniguchi created the "boxes" that made up the names, prepopulated the names, and then "[Taniguchi] said, well, we need a signature to follow that name." (Tr. 258) Taniguchi did not tell Kanei how many signatures he needed legally; she told him to get *all* of the signatures! Specifically, what she said is that "we," – the Company, "need" them. (Tr. 258)

Respondent then relies on other Board cases to support its argument that Taniguchi's conduct was proper under the Act, but all of the cases are distinguished and do not apply for one simple reason: the employers' agents in those cases did not say anything to foster or encourage the decertification process. *See Eastern States Optical Co.*, 275 NLRB 371, 372-3, *Bridgestone Firestone, Inc.*, 335 NLRB 941 (2001), *Ernst Home Centers*, 308 NLRB 848 (1992).

In this case, KVE asked employees during a staff meeting to sign a petition to get out of the Union. The petition was drafted on KVE letterhead, from KVE President Stan Morinaka in September 2016, just a few months prior to the January 2016 letter and petition ultimately relied on by KVE to withdraw from the Union. It was Morinaka who had first asked Taniguchi to seek

---

[7] In the other cases Respondent attempts to distinguish, it conveniently leaves out the facts that support application of the case to the current situation. Even in *Erickson's Sentry of Bend*, 273 NLRB 63 (1984), where the ALJ in the underlying case states that the act of providing language for a petition at an employee's request, *on its own*, does not constitute a violation, the employer's conduct giving employees the impression that the employer favored the petition and encouraged the employees to sign the petition does. See Decision at 10:14-19. In the Board's decision, it clearly states that providing employees information on how to resign or withdraw from the union does not violate Section 8(a)(1) " 'as long as the employer makes no attempt to ascertain whether employees will avail themselves of this right nor offers any assistance, or otherwise creates a situation where employees would tend to feel peril in refraining from such revocation.." *Id.* at 64, *citing R.L. White Co.*, 262 NLRB 575, 576 (1982). There is no clearer indication to employees that an employer favors a petition and encourages a petition to be signed and returned than the Office Manager creating a prepopulated table, drafting the petition as a letter to the employer's counsel, and instructing the employee that "we" – the Company – need signatures behind each employee name. (Tr. 258)

advice from counsel regarding how to get out of the Union. Morinaka's own testimony at the hearing was that he hired attorney Jeffrey Harris during this period to help him "quit the Union." (Tr. 198-99) When the petition was finally created, Taniguchi instructed Kanei that "we" need signatures for all of the employees listed in the table. This level of assistance goes well beyond minor and ministerial assistance, and distinguishes KVE's conduct from the cases that found no violation for neutral assistance.

For all of these reasons, the Board should reject Respondent's Exceptions 1, 5, 6, 7, 8, 13 and 14, related to the Administrative Law Judge's conclusion that Respondent violated the Act in its withdrawal of recognition from the Union.

4. The Language of the Petition, on its Face, Does Not Establish Loss of Majority Support

The ALJ properly concluded that the language of the January 2016 letter and petition, on its face, did not adequately evidence loss of majority support for the Union. Respondent contends that the ALJ *should* have made inferences that the employees did not want to be represented by the Union, despite the absence of such language, based on several points.

First, Respondent posits that the brief introductory language in the petition stating that the employees "no longer desired to be a part of the" Union should be sufficient to indicate a desire to no longer be represented by the Union. (R. Br. in Support at 31; GC Exh. 24) That argument may have had some merit under *Pacific Coast Supply LLC v. NLRB*, 801 F.3d 321 (D.C. Cir. 2015), had that been the language of the petition. However, that brief statement is limited to an introductory paragraph to Mr. Harris, and is immediately followed by language regarding membership *only*.

//

//

But even more damaging to Respondent's argument is the language of the petition itself, which states:

> My initial and signature above indicates my desire individual desire to participate as a member of Operating Engineers Local Union #3. This choice was made of my own free will and desire and was not coerced in making my decision.

(GC Exh. 24) Not only is the language limited to membership in the Union, but it states that those employees who signed the petition actually *desire* to participate as a member of the Union. The language of the letter and petition is, at best, ambiguous. An employer *cannot* withdraw recognition from a Union based on ambiguous evidence of loss of majority support, as KVE has done and repeatedly attempts to defend here. *Levitz Furniture Company*, 333 NLRB 717 (2001), *see also Liberty Bakery Kitchen, Inc.*, 366 NLRB No. 19 (2018).

Second, Respondent requests that the Board ignore the ambiguous language of the petition, calling it merely a clerical error that the Board should overlook. It even goes as far as to say that the ALJ was *required* to interpret the language in light of the employee's purported objective – as stated by Respondent. But it still has the problem of the ambiguity raised by the exclusive reference in that section to union membership and not union representation. Respondent is asking the Board to overlook multiple ambiguities in the petition and letter to Harris to arrive at its desired conclusion – that it did not violate the Act. The Board should reject these efforts.

Finally, Respondent makes the ridiculous argument that the ALJ should have inferred that employees who signed the petition no longer wanted to be represented by the Union since the letter containing the petition was addressed to Respondent's counsel, Jeffrey Harris. As a reminder, it was Taniguchi who added Harris's name to the letter, essentially transforming the document Kanei had created from whatever it was before into something Respondent was hoping

it could rely on to withdraw recognition from the Union. This just reinforces the employer taint of the entire petition process and the ALJ's conclusion that KVE's conduct violated the Act.

5. The September 2016 Petition Tainted All Withdrawal Efforts

Respondent takes exception to the ALJ's consideration of the September 2016 petition as further evidence of Respondent's taint of the entire withdrawal process. Respondent attempts to completely invalidate the September 2016 document by raising a discrepancy regarding its author. (GC Exh. 26) Although the record is unclear, that fact is of little significance since it is a distinction without a difference, as both Taniguchi and Rivera are managers who represent KVE, and thus agents of KVE.[8]

Further, what the ALJ considered to be most significant in concluding that the September 2016 petition tainted the withdrawal process was the facts apparent from the face of the document alone: (1) it was prepared on KVE letterhead; (2) it was marked "from" President Stan Morinaka; (3) it contained a prepopulated table with employee names and was marked by employees without any effort at keeping their responses confidential. As the ALJ appropriately noted, allowing a petition to be circulated on company letterhead, from the President of the company, was inherently coercive and tainted any future withdrawal efforts, including the letter and petition in January 2017- just a few months later. *Placke Toyota, Inc.*, 215 NLRB 395 (1974), *Lee Lumber & Building Material Corp.*, 117 F.3d 1454 (D.C. Cir. 1997); Decision at 11: 10-17.

//

[8] Ironically Respondent argues that KVE cannot be responsible for the September 2016 petition if it was indeed created by Taniguchi since in its opinion, she is not an agent of KVE. What it does not realize is that any involvement she may have had in the creation of the petition once again reinforces her position as an agent of the employer, particularly if it is true that it was the employees who initiated the petition and then approached Taniguchi to assist with its creation, as Respondent insinuates. (R. Br. in Support at 35-36)

The facts support the ALJ's conclusion. It was not until *after* employees received, reviewed and signed this petition in early September 2016, that they approached KVE management to discuss withdrawal of recognition from the Union. (GC Exh. 1(z)) By then, Morinaka had already interfered with their Section 7 rights. Exceptions 1, 13, 15, 16, 17, 18 and 19 should be rejected on this basis as well.[9]

B. THE ALJ PROPERLY CONCLUDED THAT RESPONDENT REFUSED TO PROVIDE INFORMATION IN VIOLATION OF THE ACT

This issue is simple: Respondent violated Sections 8(a)(1) and (5) of the Act by repeatedly refusing and failing to provide information responsive to Union's request related to an outstanding grievance, causing the indefinite delay of the arbitration hearing. The Union requested specific, concrete information related to the Union's position in a grievance as well as the Respondent's defense. The information was needed to fully evaluate the merits of the grievance and investigate the respective parties' positions. When Respondent asked why the information was relevant, the Union provided this in an abundance of detail numerous times verbally, and then in writing in its letter dated January 25, 2017, setting forth all outstanding requests (which was all of them) and additional requests related to the grievance.

Respondent argues – for the first time – that the Union is not entitled to the information because it is not relevant. This position had never previously been asserted throughout the parties' exchanges. Indeed, Respondent merely provided that it did not possess the information

[9] Respondent's exceptions to the ALJ's conclusion that there are 11 bargaining unit drivers is more appropriately addressed during the compliance phase. R. Br. in Support at 36-37. The addition or exclusion of freight truck drivers Respondent contends falls outside the bargaining unit does not have any determinative impact on the outstanding disputes. Whether they are included or excluded, the issue is whether the document in and of itself evidences loss of majority support rather than whether a sufficient number of drivers signed it. Indeed, all drivers listed on the document signed it. The dispute over this fact is further confusing as it is based on information provided by Respondent at the hearing. Exceptions 3 and 4 should be rejected as well for these reasons.

sought. On April 12, 2017, Respondent's counsel sent the identical information it had sent to Union counsel on January 10, 2017, and acknowledged that this covered only "some of the union's information request." (GC Exh. 21) Harris continued, "I do not have any of the other information sought." (GC Exh. 21) The last correspondence came from Respondent's counsel indicating that he was "still trying to follow up" with KVE regarding information responsive to the Union's request. (GC Exh. 23) Respondent did not raise any relevancy defense or claim that the Union was not entitled to information about non-bargaining unit employees as it attempts to do now.

Its delayed defense is further misguided since the information regarding the non-bargaining unit employees is inherently relevant to the merits of the grievance.[10] As the ALJ already indicated in his decision, information necessary "to enable the Union to evaluate any grievances filed... is presumptively relevant." *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); Decision at 12:23-25. This includes information pertaining to nonbargaining unit employees where the information is relevant to contract enforcement. Here, the Union required information about nonbargaining unit employees because the grievance centered on KVE's justification for a layoff of three bargaining unit employees while retaining nonbargaining unit employees who continued to perform covered work.

---

[10] Throughout these proceedings, Respondent has been obsessed with its argument that freight truck driving is not covered work. It argues in its Brief in Support of its Exceptions that such information is not relevant because it relates to its favored nations defense, struck by the ALJ. (R. Br. in Support at 44-46) It is indeed relevant not because of that defense, but because it is Respondent's underlying defense to the outstanding grievance. The merits of that dispute are more appropriately reserved for the arbitration when Charging Party would have the benefit of relevant information to properly investigate Respondent's claims. It does not, however, provide a defense to the underlying violation for refusal to provide responsive information; the actual matter at issue in this case.

C. RESPONDENT ENGAGED IN UNLAWFUL POLLING

Polling involves any inquiry into a union's claim of majority support. *Struksnes Construction Co., Inc.* (1967) 165 NLRB 1062. Respondent attempts to distinguish its declarations from a poll by bringing up all the alternative reasons for the poll. The declarations constituted polling by virtue of this single statement therein: "I no longer wished to be represented by the Union, when I signed the petition, and I no longer wish to be represented by the Union today." (GC Exh. 1(m)) Through the preprinted statement, Respondent sought to determine employee sentiment toward the Union back in January 2017, but also in August 2017 at the moment when the declarations were signed. A refusal to sign the declaration or to modify the language could indicate an employee's disagreement with that statement. That is clearly an attempt to inquire into a union's majority support.

Respondent's argument further fails because determining the truth about the Union's claim of majority status is precisely the purpose of the declarations. Respondent prepared the declarations to support its Motion for Partial Summary Judgment and respond to Charging Party's Opposition to the Motion, which presented reasons why Respondent's withdrawal of recognition was improper and why Respondent did not have evidence of loss of majority support sufficient to withdraw recognition from the Union. Respondent hoped to show through the declarations that the drivers no longer wanted to be represented by the Union.

The Board should also disregard Respondent's claim that its conduct was permitted under *Johnnie's Poultry Co.*, 146 NLRB 770 (1964), as it was not. Under *Johnnie's*, the Board stated that an employer may be able to inquire with employees about their Section 7 activities as part of an "investigation of facts concerning issues raised in a complaint where such interrogation is necessary in preparing the employer's defense for trial of the case." *Id.* at 775. But even then, the Board requires safeguards:

> the employer must communicate to the employee the purpose of the questioning, assure him that no reprisal will take place, and obtain his participation on a voluntary basis; the questioning must occur in a context free from employer hostility to union organization and must not be itself coercive in nature; and the questions must not exceed the necessities of the legitimate purpose by prying into other union matters… or otherwise interfering with the statutory rights of employees."

Id.

Respondent relies solely on language typed into all of the declarations by Belcaid as the supposed "safeguards." Her own testimony confirmed, however, that she has no idea how the declarations were actually presented to the drivers other than Kanei, the only driver she spoke with regarding the declarations. (Tr. 166) The prepared declarations *did not* contain assurances that employees were told about the purpose of the questioning. Further, without any evidence of how the drivers actually received and signed the declarations, there is no evidence that the employees actually received assurances that no reprisals would take place. Respondent did not establish that questioning took place in a context free from employer hostility to union organization, or that employees even had the benefit of answering questions printed in the declaration, since Respondent presented no evidence of how questioning took place. The evidence in the record does not establish any compliance by Respondent with the *Johnnie's Poultry* safeguards, and for those reasons it is not a defense to its violations of Section 8(a)(1) of the Act for unlawful polling of employees in violation of *Struksnes*.

D. RESPONDENT'S UNILATERAL CHANGES VIOLATED THE ACT

Respondent concedes that it ceased making trust fund contributions on behalf of employees and also ceased deducting Union dues without notice to the Union or an opportunity for the Union to bargain. Its primary defense to the ALJ's findings that the conduct violated Sections 8(a)(1) and (5) of the Act is its reliance on its withdrawal of recognition. It argues that the ALJ's conclusion about the unilateral change is wrong because his conclusion about the

withdrawal of recognition is wrong. Its other defenses – that the Union should have filed a grievance and that the Union violated the favored nations provision[11] – to the extent Respondent actually believes they excuse Respondent's conduct outside of a proper withdrawal of recognition, do not even deserve a response.

IV. CONCLUSION

For all of the foregoing reasons, Charging Party respectfully requests that the Board adopt the ALJ's decision and conclude that Respondent violated the Act in all of the ways proposed in the ALJ's decision.[12] Charging Party further requests that the Board order the remedies as proposed by the ALJ, to be modified only as stated in Counsel for the General Counsel's exceptions.

DATED: July 9, 2018

Respectfully submitted,

OPERATING ENGINEERS LOCAL UNION NO. 3.

By: _____

GENING LIAO
Attorney for Charging Party
Operating Engineers Local Union No. 3

[11] The ALJ granted a motion to strike this defense on the first day of the administrative hearing. (Tr. 17-18)

[12] The Union respectfully requests a summary rejection of Respondent's untimely settlement offer.

Re: Operating Engineers Local Union No. 3 v. Kauai Veterans Express Co
NLRB No.'s 20-CA-193339, 20-CA-203829, 20-CA-204839, 20-CA-209177

PROOF OF SERVICE

I am employed in the County of Alameda, State of California. I am over the age of 18 years and **not a party to this action**.

My business address is 1620 South Loop Road, Alameda, CA 94502. My electronic service address is: ijackson@oe3. My fax number is (510) 748-7436.

On July 9, 2018, I E-filed with the Office of the Executive Secretary of the NLRB the following **documents**:

- Charging Party's Answering Brief

I served copies of the documents via email on the **persons** below as follows:

Gary Shinners, Executive Secretary
National Labor Relations Board
Office of the Executive Secretary
1015 Half Street SE
Washington, D.C. 20570-0001

Dale Yashiki, Officer-in-Charge
National Labor Relations Board, Sub-Region 37
P.O. Box 50208
Honolulu, HI 96850
Dale.Yashiki@nlrb.gov

Jill Coffman, Regional Director
National Labor Relations Board, Region 20
901 Market Street, Suite 400
San Francisco, CA 94103-1735
Jill.Coffman@nlrb.gov

Jeffrey S. Harris, Esq.
Torkildson, Katz, Moore,
Hetherington, & Harris
700 Bishop Street, Floor 15
Honolulu, HI 96813-4116
JSH@torkildson.com

Meredith Burns, Field Attorney
National Labor Relations Board, Sub-Region 37
P.O. Box 50208
Honolulu, HI 96850
Meredith.Burns@nlrb.gov

Christine K.D. Belcaid, Esq.
Torkildson, Katz, Moore,
Hetherington, & Harris
700 Bishop Street, Floor 15
Honolulu, HI 96813-4116
ckd@torkildson.com

The documents were served by the following means:

☐ **BY UNITED STATES MAIL.** I enclosed the documents in a sealed envelope or package addressed to the person or persons at the addresses listed above by placing the

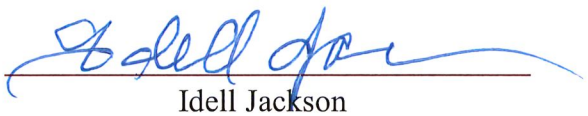
envelope for collection and delivery by the United States Postal Service or private delivery service following ordinary business practices with postage or other costs prepaid;

☐ **BY CERTIFIED MAIL**

☐ **BY FAX TRANSMISSION**. Based on an agreement of the parties to accept service by fax transmission, I faxed the documents to the persons at the fax numbers listed above. No error was reported by the fax machine that I used.

☒ **BY ELECTRONIC SERVICE.**

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on July 9, 2018 at Alameda, CA.



Idell Jackson